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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS EDUARDO MONTEJANO,

Defendant and Appellant.

H035142

(Santa Clara County

Super. Ct. No. CC828579)

On July 31, 2009, pursuant to a court offer of a sentence between 9 and 15 years in state prison, defendant Carlos Montejano pleaded no contest to three counts of forcible oral copulation (Pen. Code, § 288a, subd. (c)(2), counts one, three and five), two counts of forcible rape (Pen. Code, § 261, subd. (a)(2), counts two and four), and one count of forcible sodomy (Pen. Code, § 286, subd. (c)(2), count six).

On December 18, 2009, the court sentenced defendant to 12 years in state prison and imposed various fines and fees.

On January 4, 2010, defendant filed a notice of appeal, "based on the sentence or other matters occurring after the plea."

We appointed counsel to represent defendant in this court. Counsel filed an opening brief that stated the facts, but raised no specific issues.

On May 21, 2010, we notified defendant of his right to submit written argument on his own behalf within 30 days. To date, we have not received a response from defendant.

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we have reviewed the entire record and have concluded that there are no arguable issues on appeal. Pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, we provide "a brief description of the facts and procedural history of the case, the crimes of which the defendant was convicted, and the punishment imposed." (*Id.* at p. 110.)

#### *Facts*<sup>1</sup>

On December 7, 2008, Melanie<sup>2</sup> arranged to meet her friend Javier at the Los Gatos Creek trail. Melanie arrived at the trail between 6 and 6:30 p.m. Melanie and Javier consumed a bottle of Peppermint Schnapps and some wine. Javier's brother and his girlfriend arrived about half an hour after Javier and Melanie.

Later, defendant arrived with some marijuana. According to Javier they all smoked the marijuana.<sup>3</sup> At some point Melanie blacked out. The next thing that she remembered was waking up and her friends were gone. The defendant told her that they had left, but they had paid him \$20 to have sex with her. Melanie told the defendant that she wanted to go home and did not want to have sex with him.

As Melanie tried to get up she still felt drunk; the defendant pushed her down. Melanie tried to resist, but defendant told her " 'You don't want to do that.' " The next thing that Melanie remembered was the defendant taking off her pants and underwear. Melanie told defendant " 'No' " and " 'You don't have to do this.' " Melanie tried pushing

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<sup>1</sup> The facts are taken from the preliminary hearing transcript.

<sup>2</sup> We refer to the victim in this case by her first name only in order to protect her anonymity.

<sup>3</sup> Melanie denied that she had smoked the marijuana, but admitted that she had used cocaine the day before she met Javier.

defendant away, but he orally copulated her. When she started to cry, defendant told her to be quiet. Melanie was scared that she might be beaten or defendant might kill her.

After he orally copulated Melanie, defendant pulled down his pants and inserted his penis in her vagina. Melanie told him " 'No.' " Defendant told her to "shut up." After defendant ejaculated he orally copulated her again and had sex with her for a second time. By now Melanie felt numb and began to "emotionally and physically shut[] down." Defendant orally copulated Melanie for a third time. Defendant asked Melanie to spend the night with him, but she refused. Melanie became aggressive toward him and defendant "gave up."

However, as defendant and Melanie were lying on the ground, defendant pulled down her pants again and sodomized Melanie as she tried to fight him. Subsequently, they both fell asleep. Melanie was awakened by the defendant about 7:30 a.m.; he asked her if she was going to go home.

#### *Procedural History*

Following the preliminary hearing, on May 7, 2009, the Santa Clara County District Attorney filed an information in which defendant was charged with three counts of forcible oral copulation, two counts of forcible rape and one count of sodomy.

On May 11, 2009, defendant pleaded not guilty to all charges. As noted, subsequently, defendant entered no contest pleas to all six charges.

Before taking defendant's pleas, the court advised defendant of his trial rights, specifically, of his privilege against self-incrimination, his right to confront his accusers and his right to trial by jury as required by *Boykin v. Alabama* (1969) 395 U.S. 238 (89 S.Ct. 1709), and *In re Tahl* (1969) 1 Cal.3d 122. Defendant said that he understood and then freely and voluntarily waived those rights. Further, the court advised defendant that he had a right to testify as well as subpoena witnesses. Defendant stated that he understood and gave up those rights. Defendant was advised that he would be placed on parole for five years; that if he violated his parole he could be returned to state prison for

up to one year and his parole could be extended for an additional year. The court advised defendant of the possible immigration consequences of his pleas, that there were other consequences of his plea, including that he would have to pay a restitution fund fine of up to \$10,000 as well as other fines and fees, and would have to register as a sex offender for life. Further, the court told defendant that because he was pleading no contest to strike offenses, if he committed a new felony he could be subject to a prison term of 25 years to life.

Counsel stipulated that there was a factual basis for the pleas contained in the police reports and preliminary hearing transcript. The court found defendant "knowingly, intelligently waived all constitutional rights, freely and voluntarily entered a plea of no contest as to Counts 1 through 6."

#### *The Sentencing Hearing*

On December 18, 2009, the court sentenced defendant to 12 years in state prison consisting of the mid-term on count one (forcible oral copulation) and a consecutive six year mid-term on count six (forcible sodomy). Sentences on the remaining counts were ordered to be served concurrently. The court found that as to count six there was "chance for reflection." Accordingly, the court imposed the consecutive term pursuant to Penal Code section 667.6, subdivision (d).

The court awarded defendant 437 days credit for time served.<sup>4</sup> In addition to imposing a general order of restitution, and a court security fee of \$180, a criminal conviction assessment fee of \$180 and a \$129.75 criminal justice administration fee to the City of San Jose, the court ordered defendant to pay a \$10,000 restitution fund fine. The court imposed, but suspended a parole revocation fine in the same amount. (Pen.

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<sup>4</sup> Defendant's "worktime" credits were limited to 15 percent by operation of Penal Code section 2933.1 because he was convicted of felony offenses listed in subdivision (c) of Penal Code section 667.5.

Code, § 1202.45.) The court ordered defendant to register as a sex offender pursuant to Penal Code section 290.

In conclusion, our review of the entire record satisfies this court that defendant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Wende, supra*, 25 Cal.3d at p. 441.)

*Disposition*

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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PREMO, Acting P. J.

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McADAMS, J.